BRIEF FOR PETITIONER.

(References are to printed pages of the record, not marginal pages.)

OPINION BELOW.

Reported in 112 F. 2d 543. (See petition, p. 6.)

JURISDICTION OF THIS COURT.

Invoked under Judicial Code, Sec. 240 (a), 28 U. S. Code, Sec. 347 (a), as amended. (See petition, p. 6.)

Decision denying rehearing rendered July 24, 1940.

STATEMENT OF THE CASE.

1. Major Joseph deR. Moreno, U. S. Army, died October 16, 1936 (pp. 2, 75), leaving a $5000 life policy in the Travelers' Insurance Company of Hartford, Connecticut, payable to his executor or administrator (pp. 1–22).

2. In 1919, he made a will leaving all his property to his wife, Therese M. Moreno, and appointing her executrix (p. 73–74).

3. Prior to August, 1935, he deserted his wife, and endeavored to get her to consent to a divorce (pp. 43–44), so that he might marry Marjorie Eileen Bathurst.

4. On October 30, 1935, the Probate Court of Norfolk County, Massachusetts, entered a decree of separation between the parties (pp. 22, 68).

5. On October 18, 1935, he made a will, in which he describes himself as of Boston, Mass., leaving all his property to Marjorie Eileen Bathurst, and appointing her executrix (pp. 63–64).

6. On August 6, 1936, a court in Florida entered a divorce decree in favor of Major Moreno, based on a pretended resi-

dence in Florida, on constructive service only, and without Mrs. Moreno appearing in the case (pp. 60, 70–71).

7. Major Moreno had previously been warned that the validity of any divorce he might obtain in Florida would be contested, and there is evidence that he admitted that he had lost his residence there (pp. 43–46).

8. After his death, Mrs. Bathurst probated the will of October 18, 1935, in Florida and brought suit in the state court of Florida on a life insurance policy in the Travelers' Insurance Company, a Connecticut corporation, payable to Major Moreno's executor or administrator (pp. 60, 1–2), the action being removed to the United States District Court for the Northern District of Florida (p. 23).

9. On evidence that Major Moreno had lost his residence in Florida by acquiring one in Washington, D. C., Mrs. Moreno was appointed Collector of the estate in the District of Columbia, and as such appeared in the Florida action to claim the fund (pp. 22, 65).

10. She also appeared to contest the probate of the will of October 18, 1935 (p. 65).

11. She also filed in the Florida court a claim to dower in such property as there was in Florida (pp. 68–69).

12. It later appeared that Major Moreno had acquired a domicile in Massachusetts (pp. 39, 40–43), and after due notice to Mrs. Bathurst and a full disclosure of the facts, the Probate Court of Norfolk County, Massachusetts, allowed the will of 1919, as Major Moreno's last will and appointed your petitioner administrator with the will annexed (pp. 74–82) and the District of Columbia court, also after due notice to Mrs. Bathurst, ordered the District of Columbia assets turned over to your petitioner as the representative of the estate in the jurisdiction of domicile (pp. 39–40).

13. The Florida court, in a proceeding to which your petitioner was not a party, upheld the validity of the will of October 18, 1935 (pp. 87–88).

14. The Florida Probate Act of 1933, Sec. 36, provides:

> "To entitle a widow to dower, she must so elect by an instrument in writing signed by her . . . and filed in the office of the County Judge . . . within nine months after the first publication of notice to creditors. The County judge shall record all elections to take dower."

The will of October 18, 1935 was allowed in Florida November 21, 1936 (p. 60). The claim of dower was filed October 12, 1937 (pp. 60, 69). It may properly be inferred from these dates—and it is the fact—that the claim of dower was filed after the nine months period had expired, as presumably the notice to creditors was given promptly after probate of the will. At all events, Mrs. Moreno withdrew the claim before the time set for hearing on it (pp. 61, 88). The court refused to allowed her to withdraw, but it is apparent from the record (pp. 88–90) that she offered no evidence and that the question of the validity of the divorce was not brought up or passed on.

15. Your petitioner, as administrator with the will annexed, appointed in the domicile of Major Moreno, appeared in the United States District Court to claim the proceeds of the policy, he not being a party to any litigation in the state court of Florida.

16. The United States District Court, on motion of Mrs. Bathurst, entered a summary judgment in her favor (pp. 46–47), in spite of evidence filed by your petitioner (pp. 37–46) showing that Major Moreno had lost his domicile in Florida by acquiring one in the District of Columbia, and later had acquired one in Massachusetts, from which judgment your petitioner duly appealed.

17. The Circuit Court of Appeals, although holding that "the insurance is payable to the personal representative appointed at the true domicile at death", and that "the true domicile would be difficult to decide under the evidence in

this record. It could not be decided by summary judgment", affirmed the judgment it had held wrongly entered, on the ground of avoiding circuity of action and unnecessary expense on Mrs. Bathurst (see opinion), and denied a petition for rehearing, although the fact that substantial rights were being cut off by its decision was duly called to its attention in said petition (q. v.).

SPECIFICATION OF ERRORS.

Your petitioner contends that the Circuit Court of Appeals erred in not remanding the case for a trial on the merits on the question of domicile, because its decision is at variance with the law and the decisions of this Honorable Court in each of the matters of law set forth on pages 6–7 of the foregoing petition, under "Reasons for the Allowance of the Writ."

SUMMARY OF ARGUMENT.

The administrator in the deceased's domicile is entitled to the personal property, regardless of its location (I).

If Massachusetts was the true domicile, the probate preceedings in Florida are not binding on it (II and III).

The insurance money here involved was not in any way subject to the laws of Florida (IV).

Even if the will allowed in Florida is valid in Massachusetts, still the State of Massachusetts and all parties in interest have rights under Massachusetts law which require that the estate be administered through the Massachusetts courts (V).

The decree of the Circuit Court of Appeals in effect affirms a judgment which it holds was wrongly entered, without giving the adverse party a "day in court" (VI).

To allow a woman claiming under the will of a man whose affections she has won from his wife to force the administration of his estate in any jurisdiction which she may select for reasons advantageous to her is contrary to public policy (VII).

ARGUMENT.

I.

THE EXECUTOR OR ADMINISTRATOR APPOINTED IN THE JURISDICTION OF DOMICILE IS ENTITLED TO ALL PERSONAL PROPERTY REGARDLESS OF ITS LOCATION.

Wyman v. *Halstead,* 109 U.S. 654.
Wilkins v. *Ellett,* 9 Wall. 740.

The Circuit Court of Appeals admits this in its opinion (112 F. 2d, bottom of second column on p. 544) and cites its own decision in *Vogel* v. *N. Y. Life Ins. Co.,* 55 F. 2d, 205.

II.

THE ADMISSION OF THE WILL OF OCTOBER 18, 1935, TO PROBATE IN FLORIDA DECIDES NOTHING MORE THAN THAT THAT WILL WAS VALID UNDER THE LAWS OF FLORIDA AS REGARDS PROPERTY WITHIN FLORIDA, AND IF MASSACHUSETTS WAS THE DOMICILE, IT IS NOT BINDING ON THE COURTS OF MASSACHUSETTS.

Burbank v. *Ernst,* 232 U.S. 162.
Blount v. *Walker,* 134 U.S. 607.

III.

THE RECORD DOES NOT SHOW THAT THE PROBATE COURT IN FLORIDA PASSED ON THE QUESTION OF DOMICILE, AND EVEN IF IT DID, IF FLORIDA WAS NOT IN FACT THE DOMICILE, THE DECISION IS NOT BINDING ON THE COURTS OF MASSACHUSETTS.

The only portions of the proceedings in the Florida probate court regarding this will which are included in the record (pp. 58, 64–68), do not show that that court passed on anything more than the validity of the will.

Jurisdiction of the Florida court did not depend on domicile as is shown by the following excerpt from the Florida probate law of 1933, Section 43:

"The venue of all wills and granting of letters of administration shall be:

(a) In the county in this State where the decedent had his domicile.

(b) If the decedent has no domicile in this State, then in any county in which the decedent was possessed of any property.

(c) If the decedent had no domicile in this State, and was possessed of no property in this State, then in any county where any debtor of the decedent may reside . . ."

Different states and courts take different views on the question of testamentary capacity and undue influence, and what might be held a valid will in one court and state would not necessarily be so held in others.

The case of *Burbank* v. *Ernst,* 232 U.S. 162, is on all fours with the present case. There a will was allowed in Texas on the ground of domicile there, but a Louisiana court held Louisiana to be the true domicile, disallowed the Texas will, and allowed an earlier one, exactly as was done in the Moreno case, and this court upheld its action.

Blount v. *Walker,* 134 U.S. 607.

IV.

THE INSURANCE MONEY WAS NOT ASSETS IN FLORIDA NOR DID IT PASS UNDER THE LAWS OF FLORIDA.

The Travelers' Insurance Company is a Connecticut corporation (pp. 21–22) with its home office in Hartford (p. 3).

The money was not in the custody of the probate court administering the estate in Florida, but was in the hands of the insurance company until it was paid into the United States District Court on an interpleader (p. 23, par. H).

If Florida was not Major Moreno's domicile it did not pass "by will or by the intestate laws" of Florida. The

very will probated in Florida describes the testator as of Boston, Mass. (pp. 63, 64), and the fact that one of the witnesses was Ellwood W. Sargent, who on page 90 describes himself as of Milton, Mass., indicates (and outside evidence shows it to be the fact) that the will was executed in or near Boston.

Eidman v. *Martinez*, 184 U.S. 578.
Wyman v. *Halstead*, 109 U.S. 654.

V.

IF MASSACHUSETTS WAS THE DOMICILE FROM 1933 TILL MAJOR MORENO'S DEATH, MRS. MORENO IS ENTITLED TO HAVE HER RIGHTS AS WIDOW DETERMINED UNDER THE LAWS OF MASSACHUSETTS.

The only portion of the Florida divorce proceedings in the record is the decree (pp. 70–71). This does not show a bona fide residence in Florida, personal service on the libellee within the state, or a cause for divorce which would be recognized in Massachusetts.

Massachusetts General Laws (Ter. Ed.) Chap. 208, Sec. 39, expressly provides:

> ". . . if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth,"

and this court has held in *Haddock* v. *Haddock*, 201 U.S. 562, that bona fide residence is necessary for a divorce to be entitled to extra territorial recognition, and in *Andrews* v. *Andrews*, 188 U.S. 14, that a wife against whom a void divorce has been obtained can claim her rights as the lawful widow.

The evidence as to the divorce was introduced by Mrs.

Bathurst (pp. 52, 60, 70–71), and if it was of any materiality in the present action, it was for her to set forth the necessary jurisdictional facts to show that it was valid, and that Florida, not Massachusetts, was the true domicile. The record is barren of any evidence that Major or Mrs. Moreno was ever in Florida after he took up his residence in Washington, D. C., in 1911 (pp. 40, 42) (which domicile it is claimed he lost by acquiring one in Massachusetts in 1932 or 1933) except for one short visit in 1919 (p. 42).

Massachusetts General Laws (Ter. Ed.) Chapter 191, Section 15, so far as material, is as follows:

> "The surviving husband or wife of a deceased person . . . within six months after the probate of the will of such deceased, may file in the registry of probate a writing signed by him or by her, waiving any provisions that may have been made in it for him or for her, or claiming such portion of the estate of the deceased as he or she would have taken if the deceased had died intestate, and he or she shall thereupon take the same portion of the property of the deceased, real and personal, that he or she would have taken if the deceased had died intestate . . ."

Massachusetts General Laws (Ter. Ed.) Chapter 190, Section 1, provides as follows:

> "A surviving husband or wife shall . . . be entitled to the following share in his real and personal property not disposed of by will:
>
> (1) If the deceased leaves kindred and no issue, and it appears on determination by the probate court, as hereinafter provided, that the whole estate does not exceed five thousand dollars in value, the surviving husband or wife shall take the whole thereof; otherwise, such survivor shall take five thousand dollars and one

half of the remaining personal and one half of the remaining real property."

So far as the record discloses—and it is the fact—Major Moreno left kindred (a mother) and no issue (p. 79). If the present fund is the entire estate, Mrs. Moreno under the law of Massachusetts would take it all; otherwise she would take this entire fund and half the balance of the estate, *whether or not the Florida will is allowed in Massachusetts,* and whether or not the Florida adjudication as to the will is binding on the Massachusetts court.

VI.

THE CIRCUIT COURT, AFTER HOLDING THAT THE LOWER COURT ERRED IN ENTERING A SUMMARY JUDGMENT, PROCEEDS TO GIVE EFFECT TO THAT JUDGMENT, WITHOUT GIVING THE ADVERSE PARTY ANY TRIAL ON THE MERITS.

Obviously, the question of Major Moreno's domicile is vital to this case. It is not a case of "avoiding circuity of action" or of "subjecting" Mrs. Bathurst "to unnecessary burden" as the court says in its opinion. If the domicile was in Massachusetts, Mrs. Moreno has substantial rights, to be decided by the courts and under the laws of Massachusetts. The State of Massachusetts also has a right to collect inheritance taxes. These rights the Circuit Court of Appeals lightly tosses aside. It is as if that court had held a verdict wrongly directed for a party on a trial, and then entered judgment for the same party, without a jury ever having a chance to pass on the merits of the case. The present situation is even stronger, because on a motion for a directed verdict the case would presumably have been fully tried, whereas Rule 56 does not require that a party on a motion for summary judgment shall show he is entitled to prevail, but only that there is a "genuine issue as to any material fact", and that the moving party is not "entitled

to judgment as a matter of law." The Circuit Court of Appeals in its opinion admits that your petitioner has shown a genuine issue, yet it gives effect to the action of the District Court which it holds was wrong.

VII.

IT IS AGAINST PUBLIC POLICY TO ALLOW A WOMAN IN MRS. BATHURST'S POSITION VIRTUALLY TO TRANSFER THE ADMINISTRATION OF AN ESTATE TO ANY JURISDICTION WHERE SHE FEELS SHE MAY HAVE AN ADVANTAGE, BY THE MERE PROCESS OF GETTING SERVICE IN THAT JURISDICTION ON A DEBTOR OF THE ESTATE.

It is evident from the record that Mrs. Bathurst had won the affections of Major Moreno from his lawful wife; that he wished his wife to get a divorce so that he could marry Mrs. Bathurst; that she refused, and by her counsel said that she would contest the validity of any divorce he might obtain in either Reno, Nevada, or Florida (pp. 43–46); that after a Massachusetts court had decreed a separation (p. 22, par. D), Major Moreno, having previously made a will in favor of Mrs. Bathurst (pp. 63–64), in December, 1935, desired to make his insurance payable to her (pp. 22–23)—why he did not disclose the "relationship" between himself and Mrs. Bathurst and never carried out his intention is food for thought; perhaps he had changed his mind regarding her,—and that in August, 1936 he procured a divorce in Florida upon constructive service and without his wife subjecting herself to the jurisdiction of the Florida court (pp. 60, 70–71).

Under the decisions of this court, a divorce so obtained in the absence of bona fide residence is binding in the courts of the state granting it, but no other state is bound to recognize it.

Blackinton v. *Blackinton*, 141 Mass. 432, quoted by

this court with approval in *Haddock* v. *Haddock,* 201 U.S. 562, 578–9.
Maynard v. *Hill,* 125 U.S. 190.

If Major Moreno had lost his Florida domicile (and there is evidence that he admitted he had lost it) (pp. 43–46), his claim of domicile in Florida for the purpose of divorce was clearly colorable. Indeed, Mrs. Bathurst offered no evidence that he had re-acquired a Florida domicile, but relied on his having kept the domicile of origin in Florida.

The laws of different states differ widely in the matter of a wife's rights if she waives her husband's will. Very likely in some states she has no rights. If, therefore, a person who claims under a will adverse to the wife can by the mere process of bringing suit in any state, where service of process on a debtor can be had, subject part of the personal property to the probate laws of that state, she can so subject the whole of the personal property, and thus deprive the domiciliary state of all power over the estates of its own citizens, and the widow and next of kin of their rights under the laws of the domiciliary state.

This situation becomes worse where, as here, the rights of the widow depend on the validity of a divorce which the courts of the forum so selected must recognize, but which the domiciliary state refuses to recognize on grounds of public policy, as this court held Massachusetts was entitled to do in *Andrews* v. *Andrews,* 188 U.S. 14, 32–34.

If the decision of the Circuit Court of Appeals is upheld, it affords an easy way for persons to nullify the rules laid down by this court regarding administration in *Burbank* v. *Ernst,* 232 U.S. 162, and the effect of divorce not based on residence, in *Haddock* v. *Haddock,* 201 U.S. 562.

Respectfully submitted,

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